IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2007 Session

MIKE ELLIS v. PAULINE S. SPROUSE RESIDUARY TRUST, ET AL.

Appeal from the Circuit Court for Knox County
No. 3-51-05 Wheeler A. Rosenbalm, Judge

No. E2006-01771-COA-R3-CV - FILED OCTOBER 26, 2007

Mike Ellis ("Farmer") claims he exercised a renewal option on a lease of real property for the years 2002 through 2006. The property was formerly owned by Mary Bagwell ("Prior Landlord") and is presently owned by Kerry M. Sprouse ("Landlord").[1] Farmer argues that Landlord violated his five-year renewal lease when he forced Farmer to vacate the property at the end of 2004. Farmer sued Landlord, seeking compensatory and punitive damages. He claimed a trespass in 2004 and lost profits in 2005 and 2006. The case was tried to a jury, which returned a verdict awarding Farmer compensatory damages on both claims. In addition, the jury awarded punitive damages. Landlord concedes the compensatory damages for trespass, but appeals with respect to the damages for lost profits and the punitive damages, claiming the trial court misapplied the law regarding the timing of lease renewals. We agree and conclude that Farmer had no right to occupy and use the property in 2005 or 2006. Accordingly, we vacate the lost profits award. As a result, the total compensatory award is modified from $82,534 to the conceded damages for the 2004 trespass of $534. As a consequence of this reduction, the $30,000 punitive damages award is vacated as being disproportionate to the award of compensatory damages. As an additional basis for vacating the award of punitive damages, we note that it was arguably based upon not only the 2004 trespass but also Landlord's action in expelling Farmer from the property at the end of 2004. We remand for a new trial on punitive damages based solely upon the 2004 trespass.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Vacated in Part and Modified in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

---

[1] Based upon admitted allegations in the complaint, it is clear that Kerry M. Sprouse is the trustee of the Pauline S. Sprouse Residuary Trust. He purchased the property in question on behalf of the trust. Both Mr. Sprouse and the Sprouse Trust are named defendants in this case, and the judgment was against both, but for the sake of simplicity, we will refer only to Mr. Sprouse in this opinion.

W. Tyler Chastain and Margo J. Maxwell, Knoxville, Tennessee, for the appellants, Pauline S. Sprouse Residuary Trust and Kerry M. Sprouse.

G. Wendell Thomas, Jr., Rob Quillin, and Kevin C. Stevens, Knoxville, Tennessee, for the appellee, Mike Ellis.

OPINION

I.

In January 1997, Prior Landlord leased a portion of her property to Farmer for a five-year term, renewable for a second five-year term at Farmer's option. The lease agreement is short and informal. It provides as follows:

> LEASE AGREMENT [sic]
>
> THIS LEASE BETWEEN MARY BRUCE WILLIAMS AND MIKE ELLIS FOR HER PROPERTY AT THE END OF ARNOLD ROAD IN MASCOT, TENNESSEE. [EXCLUDING HOUSE]
>
> THIS LEASE WILL BE FOR A PEROID [sic] OF FIVE YEARS WITH MIKE ELLIS HAVING OPTION OF FIVE ADITIONAL [sic] YEARS
>
> THIS LEASE WILL BEGIN JANUARY 1 1997
>
> PAYMENT WILL BE THREE THOULSAND [sic] DOLLARS PER YEAR DUE ON OR BEFORE JANUARY 31 OF EACH YEAR

(Capitalization and bracketed phrase, "EXCLUDING HOUSE," in original.)

Farmer farmed the land from 1997 through 2001, and, as provided for in the lease, paid each year's rent to Prior Landlord in the month of January. The parties dispute what happened at the end of the five-year term, but Farmer testified at trial that he contacted Prior Landlord, "probably" in January 2002, and informed her of his intent to renew the lease. In any event, it is undisputed that he paid a year's rent to Prior Landlord in 2002, and again in 2003 and 2004, always in January; that these payments were accepted; and that Farmer continued to farm the land during those years.

In May 2004, Prior Landlord sold the property to Landlord. The real estate sales contract includes handwritten language stating, "CURRENT LEASE NOT TO BE DISTURBED." (Capitalization in original.) However, the owner's affidavit and title policy indicated that there was no long-term lease on the property.

Landlord's brief on appeal states that he was "aware of [Farmer's] right to use the Leased Premises in 2004" – as, Landlord asserts, a "holdover tenant" – and that Landlord "agreed to this term in the Sales Contract." Nevertheless, Landlord entered onto the farm in June 2004 without Farmer's permission and drove through a portion of Farmer's corn crop in order to make a path from the house (which both parties agree Landlord had the right to occupy) to the river. Farmer testified at trial that Landlord, when confronted about this incident shortly after it occurred, stated that he did not recognize Farmer's lease and threatened to plow the rest of his crop under. Subsequently, however, Landlord offered to pay for Farmer's damages resulting from this incident – but apparently reconsidered the offer after Farmer sued him. In any event, Farmer sent Landlord a bill for the damage to his crop, but Landlord never paid it.

The damage to Farmer's corn crop from the June 2004 incident is the source of the $534 compensatory damages award for trespass. At trial, Landlord claimed that Farmer relied on hearsay evidence to arrive at this amount, but, on appeal, Landlord has apparently dropped this argument, as he now asks this court in his brief to award Farmer "damages . . . in the amount of $534.82 for [Landlord's] trespass and damage to the subject property in 2004."

At the heart of this case, therefore, is the award of lost profits in 2005 and 2006. The dispute turns on whether Farmer's lease extended into those years – in other words, whether he renewed the lease for the five-year period from 2002 through 2006, or whether he was merely a year-to-year holdover tenant in 2002, 2003 and 2004.[2]

Landlord demanded that Farmer vacate the property at the end of 2004, and Farmer did so under protest. He then filed suit in January 2005. At trial, he testified that he would have made $39,000 in 2005 and $49,000 in 2006 if he had been allowed to continue farming the property. The jury found that the five-year renewal lease existed, that Landlord had actual notice of it, that Landlord trespassed or interfered with Farmer's property rights, and that Farmer was entitled to $82,534 in compensatory damages: $534 for the 2004 trespass, $36,000 for lost profits in 2005 (subtracting out the $3,000 rent that Farmer would have paid) and $46,000 for lost profits in 2006 (again subtracting the rent from the lost profits total). The jury then awarded $30,000 in punitive damages.

---

[2] The jury was explicitly prevented from considering the possibility that Farmer was a holdover tenant. Both the verdict form and the judge's instructions required them to halt their deliberations if they concluded that Farmer had not renewed his lease for the five-year period from 2002 through 2006. Thus the jury was presented with just two options: either Farmer renewed the lease for an additional five-year term, or, apparently, his rights expired at the end of 2001, leaving him with no recourse at all, not even with regard to the June 2004 trespass incident. We hold that this is a false dichotomy and an incorrect application of Tennessee law to the facts of this case. As already noted, it is undisputed that Farmer paid rent in 2002, 2003, and 2004; that Prior Landlord accepted these payments; and that Prior Landlord made no attempt to remove Farmer from the land during these years. The law implies the existence of a holdover tenancy in situations such as these. *See* ***Walgreen Co. v. Walton***, 64 S.W.2d 44, 48 (Tenn. Ct. App. 1932) ("Where a tenant pays the rent and the landlord accepts it, there is a holding over."). Moreover, Landlord has acknowledged on appeal Farmer's right to use the property in 2004, which necessarily implies that Farmer was at least a holdover tenant at that time. Finally, "[i]n such cases of holding over, if the original tenancy was for a year or more, the new or hold over tenancy is from year to year." ***Smith v. Holt***, 193 S.W.2d 100, 101-02 (Tenn. Ct. App. 1946). We therefore hold, on the undisputed facts of this case, that Farmer was, at a minimum, a holdover tenant in 2002, 2003 and 2004.

Landlord appeals the 2005 and 2006 compensatory damages verdict on essentially three separate theories.[3] He argues first that there was no competent material evidence that would allow the jury to reasonably conclude that Farmer renewed the 1997-2001 lease before it expired on December 31, 2001, and that therefore, as a matter of law, Farmer lost his right to renew the lease because his option expired when the lease expired. He also argues that the damages for lost profits were improperly submitted to the jury because they were based solely upon hearsay evidence, and that the purported five-year lease renewal violated the Statute of Frauds. We do not reach these latter two claims because we agree with Landlord's first argument. Judging the case solely on the theory of recovery actually pursued at trial by Farmer, and the evidence in support of that theory, it is clear that Farmer became a year-to-year holdover tenant starting in 2002, and had no right to remain on the land in 2005 and 2006. Therefore the damages for lost profits are improper and cannot be sustained.

II.

Our review of the trial court's conclusions of law is *de novo* with no presumption of correctness. ***Taylor v. Fezell***, 158 S.W.3d 352, 357 (Tenn. 2005). The same standard applies to the trial court's application of law to the facts. ***State v. Thacker***, 164 S.W.3d 208, 248 (Tenn. 2005).

With regard to the jury's verdict, our standard of review in a civil action is limited to determining whether there is material evidence to support the verdict. *See* Tenn. R.App. P. 13(d). Appellate courts do not determine the credibility of witnesses or weigh evidence on appeal from a jury verdict. *See* ***Pullen v. Textron, Inc.***, 845 S.W.2d 777, 780 (Tenn. Ct. App. 1992) (citing ***Crabtree Masonry Co. v. C & R Constr., Inc.***, 575 S.W.2d 4, 5 (Tenn. 1978)). With respect to factual issues, a judgment based on a jury verdict will not be disturbed on appeal where the record contains material evidence supporting that verdict. *See* ***Reynolds v. Ozark Motor Lines, Inc.***, 887 S.W.2d 822, 823 (Tenn. 1994).

The determination of whether jury instructions are proper is a question of law which this court reviews *de novo* with no presumption of correctness. *See* ***Solomon v. First Am. Nat'l Bank***, 774 S.W.2d 935, 940 (Tenn. Ct. App. 1989). This determination is crucial because

> the soundness of every jury verdict rests on the fairness and accuracy of the trial court's instructions. Since the instructions are the sole source of the legal principles needed to guide the jury's deliberations, trial courts must give substantially accurate instructions concerning the law applicable to the matters at issue.

[3] He also appeals the punitive damages award, but we view this challenge as essentially derivative of the compensatory damages challenge – if the vast bulk of the $82,534 in compensatory damages is thrown out, then the $30,000 punitive damage award is obviously inappropriate as well – and thus we will discuss it at the end of this opinion, after addressing the issues regarding the compensatory damages award.

Ladd v. Honda Motor Co., 939 S.W.2d 83, 94 (Tenn. Ct. App. 1996) (citations omitted). However, "[j]ury instructions need not be perfect in every detail." ***Id.*** We must consider the jury charge as a whole, and we will not invalidate it if it fairly defines the legal issues in the case and does not mislead the jury. *See* ***Hunter v. Burke***, 958 S.W.2d 751, 756 (Tenn. Ct. App. 1997).

III.

A.

"Renewal options . . . are essentially unilateral contracts giving the lessee an irrevocable right [to] extend a lease during the option period." ***Abou-Sakher v. Humphreys County***, 955 S.W.2d 65, 68 (Tenn. Ct. App. 1997). "Lessees must give timely notice according to the terms of the option, and lessees who fail to give the required notice lose their right to renew the lease." ***Id.*** The central question in the instant case is what constitutes timely notice.

Although Landlord is the defendant in this case, the crux of the dispute is what transpired between Farmer and Prior Landlord at the end of 2001 and the beginning of 2002. If Farmer successfully exercised his option to renew the five-year lease before his right to do so expired, then a five-year lease came into being as of January 1, 2002. Thus it would follow that Landlord, when he purchased the property from Prior Landlord in May 2004, had no right to demand that Farmer stop farming the property at the end of 2004.[4] If, on the other hand, Farmer attempted to exercise his option in 2001-02, but failed because his notice came too late to be effective, then he was a year-to-year holdover tenant, and his rights with respect to the property ceased at the end of the day December 31, 2004. This would mean that Landlord had every right to demand that Farmer vacate the property, and Farmer is not entitled to any damages for lost profits in 2005 and 2006.

With regard to the effectiveness of Farmer's notice to Prior Landlord of his intent to exercise his option, the trial judge instructed the jury as follows:

> Now, to establish that he has an extended lease agreement or an additional five years, the [Farmer] must establish by a preponderance of the evidence that he accepted the landlord's offer to extend the lease.
>
> To prove that he accepted that offer, the [Farmer] must show that somehow he manifested his ascent [sic] or agreement to the landlord's offer to extend the lease.

[4] At trial, Landlord argued that even if there was a five-year lease, it was not recorded and he did not have actual notice of it, and therefore it was not binding on him as Prior Landlord's successor-in-interest. However, the jury found that Landlord had actual notice, and Landlord only briefly touches upon this aspect of the verdict in his main and reply briefs. In any event, we decide the case on other grounds that pretermit this issue.

That is, he accepted that irrevocable offer. The offer contained in the lease agreement marked Exhibit 1, does not specify how that offer is to be accepted.

You're instructed that silence or inaction on the part of the [Farmer], as the offeree, cannot constitute acceptance. [Farmer] must somehow show that he manifested his acceptance of or ascent [sic] to that [offer] in order to extend the lease.

You're instructed that acceptance or ascent [sic] to the offer is a condition of min[d], and [Farmer's] ascent [sic] or acceptance may be either manifested by his express statement, that is either oral or written, or may be shown by circumstances which would reasonably convey to the landlord that [Farmer] was accepting or assenting to the offer to extend the lease.

Now, this lease agreement marked Exhibit 1 in this case further does not specify when the offer is to be accepted.

Where no time is fixed in the offer, it expires at the end of a reasonable time, unless the parties treat the offer as continuing in force.

What is a reasonable time depends largely upon the nature of the particular offer and the circumstances of the case.

You are therefore instructed that the offer, in this case, could be accepted by the [Farmer] at any time during that initial lease term, or within a reasonable time following the expiration of the term specified in [the lease].

The mere holding over or continuance of occupancy by the [Farmer] lessee, after expiration of that initial period as specified in [the lease], under our law creates a presumption that the lessee intends to accept the offer to extend the lease for an additional time.

This presumption is not conclusive, and it may be rebutted by contrary evidence. In other words, where a lease gives a tenant an option to renew the lease, it does not specify or specifically require oral or written notice to be given by the [tenant], and where the tenant remains in possession of the premises and continues paying rent under the terms of the lease, and the rent is accepted by the landlord

> without objection, there is a presumption that the tenant has elected to renew the lease in accordance with the terms of the options [sic].
>
> So where a lease gives a tenant the right to renew the lease at his election, and the tenant elects to continue, the lease continues for the renewal period, subject to all of the terms and conditions and covenants of the original term, and it is not necessary that a new lease document or writing be executed.
>
> In the absence of an express provision that a lease is intended to be executed, the presumption is that no new lease is intended, but the lessee is to continue to hold under the original lease.
>
> Now, as I indicated, this presumption is not conclusive and it may be rebutted by contrary evidence. So in deciding whether [Farmer] accepted the offer to extend the lease in this case, you must weigh this presumption with all of the other evidence.
>
> Unless you are convinced by the greater weight of credible evidence, that more likely than not the [Farmer] accepted the offer to extend the lease in this case, you must find that the lease was not extended and therefore, that the [Farmer] did not have a lease for an additional five-year period.
>
> Now, this means that under your special verdict form, before you can answer Question 1 yes, you must find that [Farmer] has established by a preponderance of the evidence, in accordance with these instructions that I have given to you, that he accepted the landlord's offer and extended the lease for five additional years.
>
> If your answer to that question is no, if you find that the [Farmer] has failed to establish that by a preponderance of the evidence, that ends your deliberation, because there would be no additional lease, and therefore, [Farmer] is not entitled to recover.

The jury answered "yes" to Question 1, "Did [Farmer] accept the landlord's offer to extend [Farmer]'s lease for five (5) additional years?" Based on the trial judge's instructions, however, it is impossible to know what theory the jury based its answer on. They might have concluded either that Farmer exercised his option (i.e., accepted the offer) before the expiration of the lease on December 31, 2001, or that he exercised his option within a "reasonable time" after December 31. The former conclusion is not supported by any competent material evidence; the latter is unsupportable as a matter of law. We will address each theory in turn.

B.

Farmer argues that the jury had adequate grounds on which to conclude that he gave notice to Landlord by December 31, 2001, of his intent to exercise his option. He bases this argument on two alternative grounds. First, he says the jury could have concluded that his planting of crops in the autumn of 2001, which could not have been harvested until spring 2002, constituted constructive notice of his intent to exercise the option because the crops were visible in the fields by December 2001. Second, he argues that the jury could have concluded that he gave Landlord timely oral notice on the basis of his testimony that the pertinent conversation with Landlord "could have possibly" taken place in December (though he *believed* it occurred in January). We cannot accept either theory.

Farmer offers no authority for the assertion that the planting of crops, without more, can constitute constructive notice of an intent to exercise an option to renew a lease, and we can find none. Nor do we think such a conclusion is intuitively obvious, especially when a *five-year* lease renewal is at issue. The planting of crops on such a schedule could indicate any number of things, including an intent to hold over for a term shorter than five years. We are also unconvinced that the average person would necessarily be aware of the agricultural significance of a two-inch-tall wheat crop in December. Although conduct can sometimes constitute notice, ***Yarbrough v. Stiles***, 717 S.W.2d 886, 888 (Tenn. Ct. App. 1986), the conduct must be more unambiguous than that present in this case. It would be unfair to require landlords to surmise their tenants' intent from such ambiguous conduct, especially given that a requirement of giving unambiguous notice imposes only a trivial burden on a tenant. Moreover, Landlord was located out-of-state during the time period in question, so even if she *could* have surmised Farmer's intent upon seeing the crop, it would have been unreasonable for Farmer to assume that she would do so or had done so.

As for Farmer's second theory, it merits little discussion. Testimony by a witness that he "could have possibly" done A, but that he "believe[s]" he "probably" did B instead, is not positive evidence that A occurred. Absent corroboration, Farmer's testimony that he *might* have given oral notice in December (but "probably" did not) is not sufficient evidence to allow the jury to conclude that he gave notice in December. If this was the basis of the jury's conclusion – and we cannot know whether it was, or whether the jury relied on another theory – it would be a conclusion unsupported by competent material evidence.

Because we hold that the jury could not reasonably have concluded that Farmer gave Landlord notice of his intent to exercise his option prior to the expiration of the lease on December 31, 2001, we turn to the parties' arguments regarding the legal significance, if any, of oral notice given shortly *after* that date.

C.

Farmer argues that there was competent material evidence allowing the jury to conclude that Farmer gave Landlord notice of his intent to exercise the renewal option – that is to say, that Farmer

accepted Landlord's renewal offer – in January 2002. That much is clearly true. Farmer testified that he orally accepted the Prior Landlord's offer around that time, "probably" in January. Prior Landlord's testimony differs from Farmer's on this point, but the jury was entitled to credit Farmer's version of events. The jury also could have concluded that notice within a month after the expiration of the lease was "reasonable," especially in light of the annual rent due date of January 31. The question for us to decide is whether the trial judge was wrong as a matter of law to instruct the jury that notice "within a reasonable time" could be adequate – that, indeed, any notice after the expiration of the lease on December 31 could be adequate.

The question of whether late notice can be effective in such a circumstance turns on the applicability of ***Norton v. McCaskill***, 12 S.W.3d 789 (Tenn. 2000). Landlord argues that ***Norton***'s central holding – that "in the absence of a specific time designation in the lease, an option to renew remains effective only during the term of the lease" – is dispositive of the instant case. ***Id.*** at 793-94. The ***Norton*** court, explaining the logic underlying the cases from other jurisdictions that it ultimately agreed with, wrote, "[t]he reasoning behind this view is that *the option to renew is part of the lease* and therefore expires at the same time the lease expires." ***Id.*** at 793 (emphasis added). It also wrote:

> [Plaintiffs] assert that since [Defendant] did not give notice of renewal prior to the termination of the lease, the option to renew *expired with the lease* and was never properly exercised. After reviewing the cases espousing this view, *we agree*.

Id. at 792-93 (emphasis added).

However, applying this conclusion to the instant case seems, at least initially, to run afoul of ***Norton***'s limiting statement: "Our holding is confined to those leases that require renewal 'at the end of' or 'at the termination of' the lease or that contain similar language conveying the same requirement." ***Id.*** at 794. Landlord argues that Farmer's lease "does 'contain similar language . . .' *in that it contains a termination date of the Lease*" (emphasis added), but we cannot agree with this assertion. The mere existence of a defined original lease term does not constitute "similar language" under ***Norton***. When the court wrote of "similar language," it clearly meant phrases that are essentially re-wordings of "at the end of" or "at the termination of." It cannot have meant to refer to any language that simply creates a defined lease term. That would be entirely redundant, since the earlier statement – "in the absence of a specific time designation in the lease, an option to renew remains effective only during the term of the lease," ***Id.*** at 790 – necessarily implies the *existence* of an original "term of the lease."

Nevertheless, we agree with Landlord's conclusion that ***Norton*** applies to this case, albeit for a different reason than the one he asserts. We believe the "similar language" requirement, read in context, was not intended to prevent ***Norton*** from controlling leases with terms that are *less* specific than the ***Norton*** lease, but rather, to prevent it from controlling leases that are *more* specific. The relevant paragraph of ***Norton*** is as follows:

> After considering the two prominent views espoused by the courts confronted with this issue, we conclude that in the absence of a specific time designation in the lease, an option to renew remains effective only during the term of the lease. Accordingly, we agree with those courts concluding that when a lease stipulates that an option to renew must be exercised "at the end of" or "at the termination of" the lease, the lessee must exercise the option on or before the day the original lease term expires. *Obviously, parties are free to negotiate any number of other arrangements for renewal options by including specific and pertinent language in the lease agreement.* Our holding is confined to those leases that require renewal "at the end of" or "at the termination of" the lease or that contain similar language conveying the same requirement.

Id. at 793-94 (emphasis added). The second-to-last sentence of the paragraph makes clear that the court's intention in the final sentence was to prevent its holding from overriding specific contractual provisions to the contrary – not to prevent it from applying to leases *totally* lacking in specificity with regard to the renewal terms, as in this case. Thus, although a literal reading of the final sentence, in isolation, would counsel removing the instant case from the ambit of ***Norton***, the context makes clear that this was not the court's intention. We believe the court in ***Norton*** simply did not consider or fully comprehend that case's potential applicability to leases whose renewal term is even *less* specific than the one they were dealing with.

Once the limiting statement is properly understood, ***Norton***'s applicability to this case becomes clear. As noted above, and as we held explicitly in ***CGR Invs., Inc. v. Hackney Petroleum, Inc.***, "[t]he reasoning behind [***Norton***] is [that] the option to renew is part of the lease and therefore expires at the same time the lease expires." No. E2000-00256-COA-R3-CV, 2000 WL 1285246, at *3 (Tenn. Ct. App. E.S., filed September 12, 2000). There is no dispute that the initial five-year lease in this case expired on December 31, 2001. Thus, any attempt to renew it after December 31 was inherently ineffective. The court's instruction to the jury that "[w]here no time is fixed in the offer, it expires at the end of a reasonable time" was an incorrect statement of law. Where no time is fixed in the offer, it expires when the lease expires.

Farmer contends that ***Carhart v. White Mantel & Tile Co.***, 123 S.W. 747 (Tenn. 1909), rather than ***Norton***, controls the outcome of this case, and the trial judge apparently agreed. This conclusion is a misapplication of the law. ***Carhart*** merely holds that "where the tenant holds over and continues to pay," this can, under some circumstances, create a "*presumption* that he has accepted the additional term." ***Id.*** at 751 (emphasis added). Crucially, "[t]he holding over is merely prima facie evidence of the election to renew, and the presumption so raised is not conclusive, but is rebuttable by evidence." ***Id.*** (quoting 6 Am. & Eng. Ann. Cas. 339). Even if such a presumption

arises in this case,[5] it is clearly rebutted by the evidence that Farmer did not renew until after the expiration of the lease. A ***Carhart*** presumption cannot and does not alter the ***Norton*** rule that options to renew a lease expire when the lease expires. Whether this renders ***Carhart*** effectively inapplicable to all lease renewal timing disputes is something we need not address here, except to point out that, if there is any conflict between ***Carhart*** and ***Norton***, the latter clearly controls, as it was decided 91 years after the former by the same court, and is closer to the facts of this case in any event.[6] For all of the reasons stated above, we hold that Farmer's option to renew his lease expired at the end of the day on December 31, 2001, and the evidence of an attempted renewal in January 2002 is therefore inadequate as a matter of law to sustain the jury's verdict.

D.

Because there is no competent material evidence to support a jury finding that Farmer renewed the lease before December 31, 2001, and because any finding that he renewed within a "reasonable time" thereafter would be legally inadequate to sustain the verdict, we turn to Farmer's last-ditch attempt to salvage the judgment in his favor: equitable relief. He argues on appeal that, at some point between January 2002 and May 2004, the purported 2002-2005 renewal lease became effective by estoppel or waiver, due to Prior Landlord's acceptance of rent and failure to object to the oral notice of his intent to renew which he says he gave her in January 2002.

Such a theory of equitable recovery is sometimes characterized by the courts as waiver and sometimes as estoppel. *See* generally William B. Johnson, Annotation, *Waiver or estoppel as to notice requirement for exercising option to renew or extend lease*, 32 A.L.R.4th 452 (1984). In Tennessee, similar circumstances have generally been treated as giving rise to a claim of waiver. *See, e.g.,* ***Noles v. Winn Oil Co.***, 204 S.W.2d 539, 540-41 (Tenn. Ct. App. 1947); ***Playmate Club, Inc. v. Country Clubs, Inc.***, 462 S.W.2d 890, 894 (Tenn. Ct. App. 1970); ***Abou-Sakher***, 955 S.W.2d at 67-69. Essentially, then, Farmer is arguing that Prior Landlord waived her right to insist on timely acceptance by Farmer, in which case Farmer would have successfully renewed the lease for five years despite his late exercise of the option.

Whatever the theory is called, Prior Landlord rightly points out that it was not raised at trial. It is "well-settled doctrine in this state that a party on appeal will not be permitted to depart from the theory on which the case was tried in the lower court." ***Tops Bar-B-Q, Inc. v. Stringer,*** 582 S.W.2d

---

[5] The facts of ***Carhart*** are sufficiently different from the facts in this case that it appears to us the presumption most likely would not apply anyway, but we need not decide this point.

[6] ***Carhart*** involved a one-year lease, renewable for two additional years, with rent due monthly, whereas ***Norton*** involved a ten-year lease, renewable for an additional ten-year term, with rent due monthly. This case involves a five-year lease, renewable for an additional five-year term, with rent due annually. Logically, the longer the term of the purported renewal, the less reasonable it is to presume an intent to renew – as opposed to an intent to hold over for a shorter period of time – from mere occupancy. In that sense, this case is closer to ***Norton*** than to ***Carhart***. In addition, the parties in ***Norton*** were similarly situated to the parties in this case; the lessee was arguing that he renewed, and thus was entitled to continued use of the leased property. ***Carhart***, by contrast, involved a different sort of dispute, with the lessee arguing that he *did not* renew, and thus did not owe additional rent.

756, 758 (Tenn. Ct. App. 1977). "As a general rule, 'questions not raised in the trial court will not be entertained on appeal.'" ***City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. v. Humphrey***, 126 S.W.3d 897, 905-06 (Tenn. 2004) (quoting ***Lawrence v. Stanford***, 655 S.W.2d 927, 929 (Tenn. 1983)). *See also* ***Taylor v. Beard***, 104 S.W.3d 507, 511 (Tenn. 2003); ***Stamper v. Venable***, 97 S.W. 812, 813 (Tenn. 1906); ***In re Estate of Milam,*** 181 S.W.3d 344, 352 (Tenn. Ct. App. 2005); ***Gibson v. Tennessee Farmers Mut. Ins. Co.***, 719 S.W.2d 299, 301 (Tenn. Ct. App. 1986); ***Thomas v. Noe***, 301 S.W.2d 391, 394 (Tenn. Ct. App. 1957).

Farmer's complaint pleaded only one theory of recovery: "[t]hat [Farmer] exercised his option to extend the Lease for an additional five (5) years through December 31, 2006, by tendering a check to [Prior Landlord] for a year's rent in January 2002 and further by orally informing [Prior Landlord] in January 2002 that he was exercising his option in the Lease." The complaint did mention Farmer's 2003 and 2004 rent payments and Prior Landlord's acceptance thereof, but there was no indication that this evidence was being used to form the basis of a second theory of recovery, based on equitable principles. Nor can we find anything in the record establishing that the waiver theory was tried by implied consent under Tenn. Rule. Civ. P. 15.02.[7]

Moreover, as this was a jury trial, the verdict cannot be sustained on the basis of a claim upon which the jury was not instructed. ***Washington v. 822 Corp.***, 43 S.W.3d 491, 493 (Tenn. Ct. App. 2000).[8] Even if the issue of waiver had been tried by implied consent of the parties, we would be constrained to conclude that the jury was not charged in such a way as to allow it to reach a verdict on the basis of waiver.

In sum, we cannot interpret the jury's verdict as being based upon a theory that was not pled, tried or charged. Doing so would be entirely unfair to Landlord, who was given no opportunity at trial to defend himself against a waiver claim. It would also be entirely contrary to well-established

---

[7] Farmer does not mention Rule 15.02, or the theory of trial by implied consent, in his brief. Nevertheless, we thoroughly reviewed the record for "evidence . . . which appears to be relevant only as to this unpled issue." ***Pressnell v. Hixon***, No. E2002-01150-COA-R3-CV, 2004 WL 2039844, at *3 (Tenn. Ct. App. E.S., filed September 14, 2004); *see also* ***Zack Cheek Builders, Inc. v. McLeod***, 597 S.W.2d 888, 890-91 (Tenn. 1980). We found none.

[8] There was a jury instruction regarding the situation "where the tenant remains in possession of the premises and continues paying rent under the terms of the lease, and the rent is accepted by the landlord without objection." The facts described in this instruction are similar to the facts that would be needed to establish waiver. However, this instruction was simply the court's application of ***Carhart*** to this case, not a waiver charge. It is factually related to, but legally distinct from, the waiver theory now being advanced by Farmer. The ***Carhart*** instruction told the jury that certain facts could give rise to a *presumption* regarding Farmer's sole theory of recovery at trial, not that those same facts might independently entitle Farmer to damages on the basis of an entirely separate, equitable theory of recovery. Nor does the following line from the jury charge establish that the jury was instructed on waiver: "Where no time is fixed in the offer, it expires at the end of a reasonable time, *unless the parties treat the offer as continuing in force*" (emphasis added). This fragmentary language does not constitute an adequate instruction establishing a second theory of recovery. If Farmer wanted the jury to be instructed on the issue of waiver, he needed to request such an instruction at trial. Having failed to make such a request, he cannot now complain that the jury was not instructed on this theory. ***Washington***, 43 S.W.3d at 493 ("The trial court cannot be held in error for an incomplete charge in the absence of such a special request.").

Tennessee law on the subject of preserving issues for appeal. We therefore decline to consider Farmer's waiver argument.

IV.

In light of these holdings, it might seem to follow that the trial court should have granted Landlord's motion for a directed verdict, and the case should now be dismissed in its entirety. However, we believe – and Landlord apparently agrees – that the jury, however improperly charged, was right on at least one point: Landlord should be held liable to Farmer for the damage to the latter's crops caused by the former's June 2004 trespass. The basic facts of the trespass are undisputed, and in light of our earlier holding[9] that Farmer was at least a year-to-year holdover tenant (and Landlord's concession that Farmer was entitled to the possession and use of the property in 2004), Farmer is clearly entitled to relief as a result of the 2004 trespass. That leaves to be decided only the amount of compensatory damages, and as noted earlier, Landlord has conceded the amount claimed by Farmer and awarded by the jury. We therefore award Farmer $534 in compensatory damages for the trespass incident in June 2004.

With regard to punitive damages, the jury's $30,000 award is obviously disproportionate and excessive given the drastically reduced compensatory award, which it now exceeds by more than a factor of fifty. *Cf.* ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. 408, 410 (2003) ("[s]ingle-digit multipliers are more likely to comport with due process"). In addition, the award cannot be upheld because it was the result of deliberations based in large part on flawed instructions and possibly grounded in incompetent evidence. We cannot sustain an award that was presumably intended, at least in part, to punish Landlord for conduct in 2005 and 2006 whose illegality Farmer failed to prove.

However, the evidence presented at trial was such that a reasonable jury could potentially have concluded that punitive damages were appropriate for the 2004 trespass alone. Obviously, we express no opinion as to whether such damages *are*, in fact, appropriate, nor what the amount should be – but we do not believe it would be just to dismiss this case outright without giving the parties a chance to be heard on this issue, in light of our holding in this opinion. Therefore, we remand this case to the court below for a new trial, only on the issue of punitive damages for the 2004 trespass.

V.

The judgment of the trial court with respect to compensatory damages is modified to reduce that award to $534. The award of punitive damages is vacated and this case is remanded for a new trial on that issue as defined in this opinion. Exercising our discretion, we tax costs on appeal 50% to the appellant Mike Ellis and 50% to the appellees Kerry M. Sprouse and the Pauline S. Sprouse Residuary Trust.

---

[9] *See supra* footnote 2.

_____

CHARLES D. SUSANO, JR., JUDGE